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BY FAX

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation; MARK ZUCKERBERG, an individual; CHRISTOPHER COX, an individual; JAVIER OLIVAN, an individual; SAMUEL LESSIN, an individual; MICHAEL VERNAL, an individual; ILYA SUKHAR, an individual; and DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond Swope, Dept. 23

DECLARATION OF ZACHARY G. F. ABRAHAMSON IN SUPPORT OF DEFENDANT FACEBOOK INC.'S OPPPOSITION TO BIRNBAUM & GODKIN, LLP AND GROSS & KLEIN LLP'S EX PARTE APPLICATION FOR AN ORDER STAYING ALL DISCOVERY PROCEEDINGS

Date:
Time:
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

I, Zachary G. F. Abrahamson, hereby declares as follow:

1. I am an attorney at law licensed to practice in the State of California. I am counsel of record in this matter for Defendant Facebook, Inc. ("Facebook"). I make this Declaration from personal knowledge, and if called to testify, I could and would testify competently thereto.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the "Six4Three" webpage from the Medium website located at https://medium.com/@six4three, downloaded on March 27, 2019.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a March 20, 2019 posting to the Medium website entitled ,"*U.S. vs. Facebook: A Playbook for SEC, DOJ and EDNY*," located at https://medium.com/@six4three/u-s-vs-facebook-a-playbook-for-the-sec-doj-and-edny-408e05783f59, downloaded on March 21, 2019.

4. Attached hereto as **Exhibit 3** is a true and correct copy of an email from the Court to Josh Lerner and others, dated March 14, 2019.

5. Attached hereto as **Exhibit 4** is a true and correct copy of an email from the Court to Donald P. Sullivan and others, dated March 22, 2019.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of March, 2019.

ZACHARY G. F. ABRAHSMON

PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 27, 2019, I served the following documents in the manner described below:

DECLARATION OF ZACHARY G. F. ABRAHAMSON IN SUPPORT OF DEFENDANT FACEBOOK INC.'S OPPPOSITION TO BIRNBAUM & GODKIN, LLP AND GROSS & KLEIN LLP'S EX PARTE APPLICATION FOR AN ORDER STAYING ALL DISCOVERY PROCEEDINGS

[X] BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from zabrahamson@durietangri.com to the email addresses

On the following part(ies) in this action:

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

Attorneys for Plaintiff Six4Three, LLC

Donald P. Sullivan
Wilson Elser
525 Market Street, 17th Floor
San Francisco, CA 94105
donald.sullivan@wilsonelser.com
Joyce.Vialpando@wilsonelser.com
Dea.Palumbo@wilsonelser.com

Attorney for Gross & Klein LLP

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

Attorney for Theodore Kramer and Thomas Scaramellino (individual capacities)

Steven J. Bolotin
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
sbolotin@morrisonmahoney.com
Llombard@morrisonmahoney.com

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 27, 2019, at San Francisco, California.

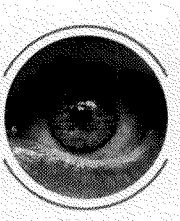
ZACHARY G. F. ABRAHSMON

EXHIBIT 1

Six4Three

Follow

One of ten of thousands affected by Facebook's deceptive business practices



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Response to FTC Task Force on Anti-Competition: 3 Investigative Tactics to Ferret Out Facebook's Fraud

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Facebook App Events: A Many-Tentacled Monster That Means #ZuckMustGo

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How Facebook Sold Your Data and Fooled Government Regulators (Until Now)

1

Highlighted by Six4Three See more

From Here's how we can break up Big Tech by Team Warren

…ral government sued Microsoft for violating anti-monopoly laws and eventually reached a settlement. The government's antitrust case against Microsoft helped clear a path for Internet companies like Google and Facebook to emerge.

From Last Week's Federal Privacy Hearings: A Debate Framed by Facebook's False Choice by Six4Three

Unlike Facebook, Apple has not suffered a decade-long string of privacy scandals, and yet Apple continues to permit you to control your phone contact list and make it available to other iPhone apps. Apple did not need to "lock down" its platform in the way Facebook did in 2015 allegedly to protect privacy. Imagine if tomorrow Apple did the same thing and prohibited all iOS apps from accessing your phone contacts list; there would be international outrage over such an anti-competitive action. Many of the apps you depend on every day would completely break, and Apple would face an immediate and very public investigation.

From Last Week's Federal Privacy Hearings: A Debate Framed by Facebook's False Choice by Six4Three

But the real issue to be grappled with in any federal privacy legislation is not "notice and choice", preemption or any of the other topics that dominated the

hearings this week. The real issue is something that wasn't discussed nearly enough, which is the inherent connection between monopoly power and data abuses. In a platform economy like Facebook, control over data and control over markets go hand in hand. Privacy and anti-competition are two sides of the same coin. They cannot be addressed separately if Congress wants its legislation to be effective.

Claps from Six4Three See more

Zuckerberg's New Privacy Essay Shows Why Facebook Needs to Be Broken Up
MIT Technology Review

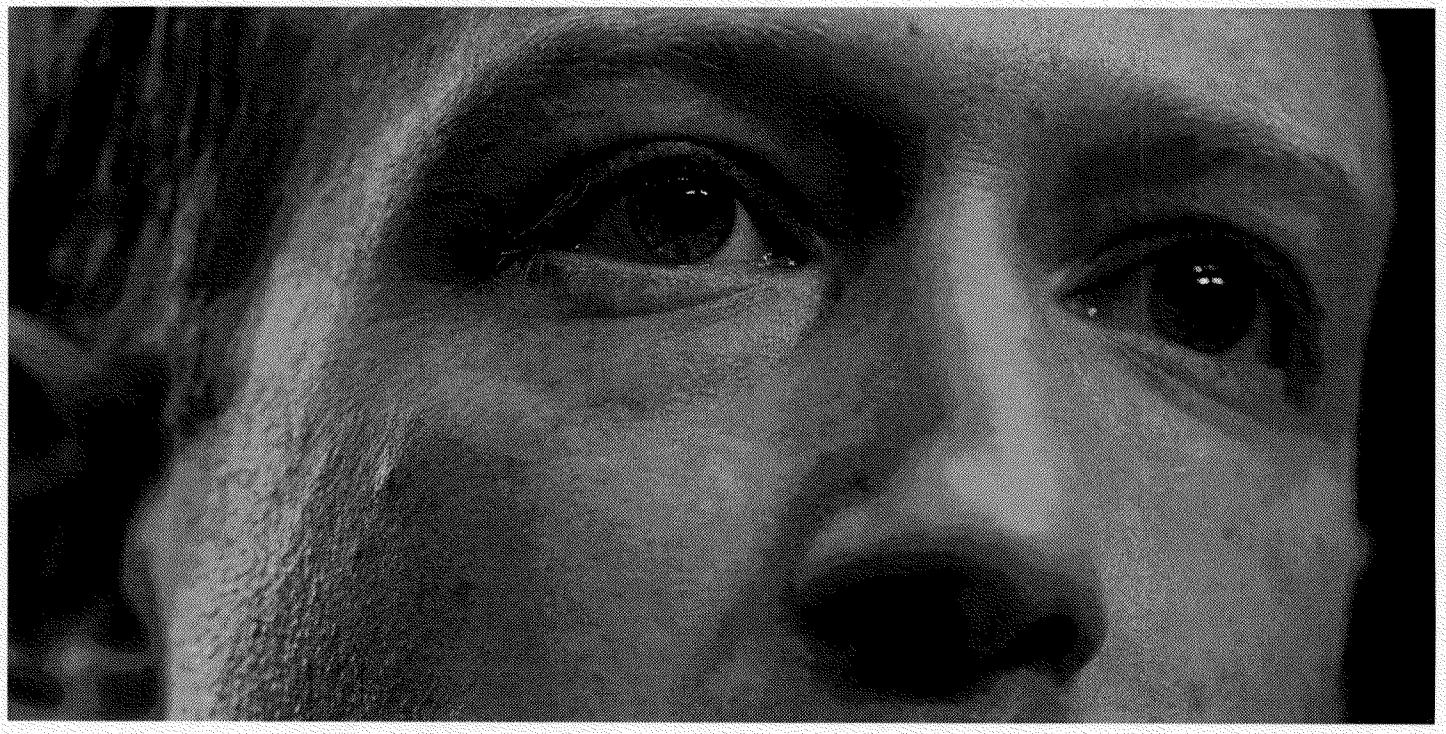
Facebook's Family of Apps Great Merge
Michael K. Spencer

7 Easy Ways to Get More Views on Medium
Larry Kim

EXHIBIT 2

U.S. vs. Facebook: A Playbook for SEC, DOJ and EDNY

Six4Three Follow
Mar 20 · 27 min read



All that follows is based on publicly available information. Most of the information in this article can be obtained or readily inferred from filings that have been available on a California court website for at least a year and in some cases more than two years. The rest can be found elsewhere on the Internet. Clear corroboration could be obtained from at least a half-dozen former Facebook employees who presumably would rather have immunity than face criminal charges and associated jail sentences upon plea or conviction. Six4Three publishes this article in exercise of its First Amendment rights to inform the public and the United States Government regarding a matter of great public interest and consequence.

Six4Three recently published a playbook for the FTC to get to the bottom of Facebook's secretive deals selling user data without privacy controls. In light of *The New York Times* article reporting multiple criminal investigations into Facebook surrounding these secretive deals, we're publishing the playbook for criminal investigators.

Perhaps the most important recognition at the outset is that the secretive deals that have been reported, whether those with a handful of device manufacturers or with 150 large technology companies, are just the tip of the iceberg. Those secretive deals handing over user data in exchange for gobs of cash were merely part and parcel of a much broader illegal scheme that begins with Facebook's transition to mobile in 2012 and continues to this very day. We believe this illegal scheme amounts to a clear RICO violation. The United Kingdom Parliament agrees. Here's how criminal investigators can overcome Facebook's incredibly effective concealment campaign and bring a viable RICO case.

Facebook's pattern of racketeering activity is a play in three acts from at least 2012 to present. The first act is all about the desperation resulting from the collapse of Facebook's desktop advertising business right around its IPO and the various securities violations that resulted. The second act is about covering up those securities violations by illegally building its mobile advertising business via extortion and wire fraud in order to close the gap in Facebook's revenue projections before the world took notice, which likely resulted in additional securities violations. The third act is about covering up the extortion and wire fraud by lying to government officials investigating Facebook while continuing to effectuate the scheme. We are still in the third act.

For almost a decade now Facebook has been covering up one illegal act with another in order to hide how it managed to ramp up its mobile advertising business faster than any other business in the history of capitalism. The abuses of Facebook's data, from Russian interference in the 2016 election to Cambridge Analytica and Brexit, all stem in substantial part from the decisions Facebook knowingly, willfully and maliciously made to facilitate this criminal conspiracy. Put simply, Facebook's transition to mobile destabilized the world.

Facebook's Pattern of Racketeering Activity: A Play In Three Acts

Act I

Securities violations to mask collapse of desktop advertising revenues

In Re: Facebook Inc. IPO

Act II

Extortion and wire fraud scheme selling user data without privacy controls in exchange for mobile ad purchases in order to mask securities violations

Styleform IT v. Facebook; Six4Three v. Facebook

Act III

Repeated lying to government investigators to mask extortion and wire fraud scheme while continuing to extend the scheme

NYT Investigation; false audit reports to FTC; false statements to Congress and federal agencies

Act I: Covering Up the Collapse of the Business—Securities Violations

We start at the beginning: Facebook's nightmare IPO on May 18, 2012. Few recall that the world's fifth largest company had the single worst performing IPO of the 2000s and was considered by Bloomberg to be the "flop of the decade." A lawsuit filed by a number of state pension funds in 2012 and 2013 covers what is publicly known about Facebook's securities violations during and after its IPO. Facebook conveniently settled this lawsuit right before the Cambridge Analytica scandal broke in early 2018. This may seem like a coincidence, but it's not. Zuckerberg knew the Cambridge Analytica scandal was coming. He knew exactly how it was facilitated by actions he took to address his failed IPO; and he has poured all the resources of his vast empire into preventing investigators from making that connection.

The biggest sound bite from the pension fund lawsuit was a text from Zuckerberg to his wife in April 2012 discussing whether the IPO would be cancelled:

> *"Everything here is going really badly. Our revenue projection has gone down so much we now think we might go public at less than $50bn if things continue."*

On May 7, 2012, Facebook met with the investment banks underwriting its IPO and secretly revised the revenue projections it had reported to them only three weeks earlier. The reason for this, as reported in the pension fund lawsuit (¶8), was that people were now using phones much more often than computers to access the Internet:

> *"The first and most damaging change concerned a shift in the way that users accessed Facebook. In particular, Facebook had determined that its users were increasingly accessing Facebook through mobile devices, such as mobile phones, instead of through traditional desktop computers, and that this had materially impaired the Company's ability to generate revenue."*

Indeed, Facebook's desktop advertising business was suffering a fatal decline and the business lost almost a quarter of a billion dollars in the middle of 2012(Q2 and Q3 report). Facebook was rapidly becoming the next MF Global, and Sandberg had to walk a very fine line. Facebook had shared projections on April 16, 2012 of $1.2 billion in revenues for the quarter and around $5 billion for the year. If Sandberg stuck to these figures, it would soon be apparent Facebook was lying. If she told the full truth, the IPO would likely be cancelled. So here's what happened.

Ten days before the IPO, Facebook told its investment bankers underwriting its IPO that it was revising its quarterly revenue projections down by 8.3% and its annual projections down by 3.5% (¶10). Notably, it did not tell the public. This is what the pension fund lawsuit is about. Facebook enriched its executives, investors and Board of Directors by telling the bankers and the public two different stories.

On May 7, the bankers got the hard numbers on revised revenue projections due to Facebook users switching to phones. On May 9, the public got a cryptic statement in an amended Registration Statement noting only that as a result of increasing mobile usage, the company's users were growing more quickly than the number of ads the company was displaying to them, never disclosing any downward revision in revenues (¶11). Remarkably, a mere 12 minutes after filing that cryptic Registration Statement, Facebook's Treasurer began calling the investment bankers to privately inform them of what the Registration Statement had left out and reminding them of the concrete numbers on revenue revisions (¶12).

None of the bankers issued any public reports with this information prior to the IPO (¶13). Institutional investors who learned of this said that it was "very, very unusual," that it was a "big shock," and that they had "never before seen that in 10 years" (¶14). The bankers involved in the IPO cut their orders before the IPO and immediately sold their shares afterwards. Meanwhile, Facebook began planning a pump and dump. It increased the price of a share to $38 from the original range of $28 to $35 and also increased the number of shares it was offering by 80 million, a 25% increase! All of these new shares came from selling insiders, including the Board of Directors and top executives, who were aware in excruciating detail that Facebook's failure to transition to mobile was cratering its advertising business. (In fact, 57% of total shares sold came from Facebook insiders.) None of this is really disputed. Facebook clearly misrepresented the state of its business to the public and violated securities laws.

But it gets worse. As if this lie to the public wasn't enough, we allege in our case that Facebook's internal revenue projections were actually much worse than even the numbers it secretly reported to the investment bankers. In other words, Facebook not only lied to the public, it lied to its own bankers. By couching one lie in another, Facebook made the lesser lie feel like the truth and kept its IPO alive. But, in doing so, it traded one problem for another: how would Facebook meet even these downwardly revised projections? In other words, how would it close the gap between the moderately revised numbers it secretly reported to the bankers and the true death spiral its business was actually in? Facebook not only desperately needed a mobile business model, it needed this non-existent mobile business model to become a massive cash cow overnight in a way that no other business has ever grown in the history of capitalism. This was the steep price Facebook had to figure out how to pay in order to save its IPO.

Act II: Saving the Business—Extortion and Wire Fraud

This brings us to the heart of the Six4Three and Styleform cases: how Facebook built its mobile business model and covered up its more nefarious securities violations from 2012. Six4Three and Styleform allege in their cases that the same Board of Directors and executives who got rich in the IPO by lying to everyone in May 2012 soon after approved a plan at the August 2012 Board of Directors meeting that, although involving lots of cryptic doublespeak, would ultimately weaponize the reliance of 2 billion people and tens of thousands of businesses in an extortion and wire fraud scheme that, frankly, has been the root cause of Facebook's destabilization of the global political

order and most of the ongoing investigations into its business. Yeah, that's a lot to take in.

Before we get into it, let's talk about extortion. When most of us think about extortion, we imagine a mafia boss putting a gun to someone's head or a spurned lover blackmailing their former partner by threatening to make a lewd photo public. In other words, we think about someone threatening another person with direct physical or personal harm *unless*.... That's how extortion usually goes down in the movies. It's a bit more complicated in real life. Here's what a jury would need to find to hold Facebook's executives liable for criminal extortion under California law (Cal. Pen. Code § 518):

1. Facebook threatened to unlawfully injure the property of another company or to connect the company to a disgrace, crime or deformity;

2. When making the threat, Facebook intended to use that fear to obtain the company's consent to give Facebook money or property;

3. As a result of the threat, the company consented to give Facebook money or property;

4. As a result of the threat, the company actually gave Facebook the money or property.

The federal counterpart to this, the Hobbs Act, says basically the same thing. Under both federal and state law, "fear" includes fear of economic loss so long as the company had a right to be free from the threatened harm or Facebook had no right to seek payment for the property provided. Otherwise the economic coercion does not rise to the level of extortion. It's simply hard bargaining. In other words, in a normal business negotiation, one side is allowed to threaten something that would harm the other so long as the other shouldn't reasonably expect to be free from that harm.

For instance, in the 1980s, Viacom sued Carl Icahn for extortion because his fund coerced Viacom into buying back stock at a premium and giving Icahn free advertising under threat of a corporate takeover. For eleven years, Icahn agreed not to take control of the company so long as Viacom kept up its end of the deal. The court held that Icahn had not extorted Viacom because Viacom had no right to be free from a corporate takeover, which happens all the time in the ordinary course of business. The Court concluded:

> *"In a 'hard bargaining' scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant, but in an extortion scenario the alleged victim has a preexisting entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant."*

So, to build its mobile ads business, did Facebook engage in savvy acts of hard bargaining or did it implement the most massive extortion scheme in the history of capitalism? Let's see.

It's not disputed but often forgotten that for more than 7 years Facebook managed the largest platform economy in the world, Facebook Platform, which it represented as operating on a neutral, level playing field where all companies had equal access to APIs provided on identical, non-discriminatory terms (this applied even to

Facebook's competitors!). This was the same kind of platform economy that Apple oversees in its App Store and Google in its Play Store.

Facebook made hundreds of specific affirmative representations to acquire its monopoly status as the judge, jury and executioner presiding over the Facebook Platform economy, which generated more economic activity than most sovereign nations. Over a billion people, tens of millions of businesses and many tens of thousands of software companies relied on these affirmative, unambiguous representations made by Facebook for more than 7 years and entered into contracts with Facebook based on these representations.

Facebook's role as the exclusive platform provider in this economy gave it the power to completely bankrupt other companies. Imagine if Tim Cook, who is already in hot water with Spotify, woke up one morning and decided that Spotify could no longer offer its app at all on iPhones. Spotify would go out of business, if not tomorrow, eventually. And the world would be up in arms over Apple's monopolistic behavior. Facebook held this same power over tens of thousands of businesses, and it actually wielded that power punitively many, many times, as demonstrated in emails like this one. But Facebook had repeatedly promised—and induced asymmetrical business relationships based on this promise—that it would never use that power in a punitive or discriminatory manner and would only use it to police actual wrongdoing.

Our case has produced evidence of Facebook building its business by making these existential threats as early as 2009. For instance, Ali Partovi, the founder of a popular music application called iLike, testified that Facebook's senior executive in charge of Platform told him in a meeting in 2009 that if iLike did not sell to Facebook for a price much lower than its market value, then Facebook would destroy iLike's business:

> *"I mean, the most salient thing I remember was that there—Ethan [Ethan Beard, former Head of Facebook Platform] said at some point, you know —you know, that, "We," meaning Facebook, "could acquire you, but not for very much." And I remember asking, "Why not for very much?" and him saying, "Because we could just shut you down." And the reason this, you know, has stuck in my memory is because I took it as somewhat of a threat, and I—I don't know whether he intended it to be conveyed as a threat or just a, you know, passing observation on his part, but I remember immediately notifying other people on my team that now Facebook has articulated this explicit threat. I don't—it had never been articulated before, that they could—or that they would consider arbitrarily shutting us down. And, you know, when you're threatened, it only takes once. You don't forget it. So from that point on, we lived under that threat."*

After Partovi refused the offer, Facebook did exactly what it said it would do. iLike collapsed. Partovi was forced to fire his employees and sell the company for a song to MySpace. By 2012, Facebook had perfected this playbook for how to leverage the reliance it was inducing as a deceptive Platform monopolist and had polished its communication of these veiled existential threats.

Figuring out how to apply this playbook to Facebook's non-existent mobile ads business was the primary focus of the business model discussions in 2012. We allege in our case that in 2012 Zuckerberg began testing a scheme where he threatened to remove the access of

certain large software companies to over 50 critical Platform APIs unless they handed over their user data (without the consent of their users!) and/or started buying Facebook's new mobile ads product, known as Mobile App Install Ads. Zuckerberg threatened to prevent or actually prevented certain large software companies from accessing APIs that Facebook continued to represent publicly as available to all companies on identical, non-discriminatory terms.

Whether the threat was explicit or veiled, it necessarily entailed fundamentally breaking the core products of these software companies and thereby destroying their businesses entirely. This wasn't just about losing a contract, missing out on an opportunity, or being bought out by a bigger competitor or predatory hedge fund. In other words, this wasn't just savvy business negotiation. This was about the most existential of questions: will my entire business be wiped out overnight? Under these circumstances, extortion law provides enhanced penalties where the "threat, express or implied, reasonably could be interpreted…to drive an enterprise out of business." (U.S.S.G. § 2B3.2, Application Note 2).

Further, in these secretive deals Facebook would seek to obtain and actually obtained the private data of people who used these other companies' services and did so without their explicit consent, including by scraping the company's website for user data. Facebook clearly had no legal right to that user data. It wasn't even the other companies' property to give in the first place. It was yours and mine. Under these circumstances, the legal elements of extortion are clearly satisfied even though these companies also happened to buy mobile ads that possessed objective value in their own right, something Facebook will harp on to defend against any extortion claims. Investigators must pierce the façade Facebook has erected around the mobile ad purchases to determine what these companies really considered themselves to be buying when transferring gobs of cash to Facebook.

Because the threat was existential, these 2012 extortion tests worked. Facebook's mobile ads business grew so quickly in the second half of 2012 that Facebook exceeded the original $5 billion projection it had communicated to bankers on April 16, 2012. It turns out Facebook didn't need to lie about its revenues after all. Although Facebook started 2012 with 0% of its revenues coming from mobile ads, it ended the year at 23%. And that was just the beginning. By the end of 2013, 23% had climbed to 53%, then by the end of 2014 it climbed to 69%, then 80% by the end of 2015, and now that number is north of 90%. Facebook's entire business today was the fruit of this poisonous seed. But it wasn't easy, especially that big jump from 23% to 53% in 2013.

The main problem Zuckerberg faced in late 2012 was how to scale these secretive deals Facebook was now coercing companies to enter under threat of wiping out their business. He had shown the strategy could work, but he needed to address the mix of carrots and sticks before he could implement a system that would churn out these deals like McDonald's cheeseburgers. In the early tests, companies were calling Zuckerberg out on the fact that these APIs were being offered on neutral, non-discriminatory terms, so entering into an agreement that allowed access to these APIs when Facebook's own representations ensured the companies already had the right to access them felt "imposed, unwanted, superfluous and fictitious," another element in proving extortion.

In short, Zuckerberg needed two things. First, he needed a way to sweeten the pot to show companies they were getting something they might not already be entitled to have. In other words, he needed some carrots to avoid completely ticking off his closest partners. The two primary ways Zuckerberg sweetened the pot were to: (1) expand the use of private APIs that had even less respect for privacy than Facebook's public APIs, so participating companies could access more valuable data about people (this is why Facebook flouted the 2012 FTC Consent Decree and never corrected its privacy-violating Platform design!); and (2) to offer the implicit or explicit promise that Zuckerberg would shut down the company's competitors if it consented to his proposal, forcing all of us to choose from a greatly restricted number of products and services.

Second, he needed a way to consider any company a criminal if it didn't meet his extortion terms. In other words, he needed his stick to be real and believable. So, in November 2012, Zuckerberg told his management team that Facebook was now implementing a policy called 'full reciprocity'. Like many Facebook communications, there was lots of cryptic doublespeak going on in this announcement. But, as we allege in our case, the events following this announcement make clear what was really going on.

The 'full reciprocity' policy was unworkable as an actual policy but was extremely effective as a get-out-of-jail-free card by giving Facebook: (1) an excuse to threaten to or actually wipe out companies unless they purchased mobile ads and/or funneled people's data back to Facebook without consent; (2) the ability to blame other companies for privacy violations related to data that *Facebook* had chosen to funnel out of its APIs without any privacy controls; and (3) cover to continue inducing companies to rely on the very APIs Zuckerberg had decided to use as extortion leverage in 2012 in order to increase the likelihood that future extortion proposals would succeed.

Under cover of the full reciprocity policy, the Growth team, run by Javi Olivan, illegally accessed non-public information about competitive applications in order to monitor their popularity and then directed the Platform team, run by Mike Vernal, to shut down an application once it became widely used *unless*…. The illegal monitoring of the growth of over 80,000 applications enabled Facebook to time its extortion proposals for when the company was growing fastest and had the most to lose.

Facebook announced a deliberately misleading reciprocity policy on January 25, 2013. The policy in no way reflected the actual decisions Zuckerberg had made at that time. For instance, the policy refused to define a 'competitive' service or 'core functionality' in order to mislead companies into thinking that only online social networks (e.g. MySpace, LinkedIn) would be considered competitive; but Facebook's internal definition of a competitive service included virtually every kind of consumer application, including those Facebook explicitly induced in its reciprocity announcement to continue using APIs it had secretly decided to use as extortion leverage.

So, by early 2013, Facebook had armed itself with an official, public reciprocity policy vague enough for Zuckerberg to consider any company a criminal. The scheme was ready to scale. Working out the kinks from the 2012 tests resulted in a systematized extortion apparatus that could accelerate Zuckerberg's mobile ads business,

which in turn resulted in expansive funneling of user data without privacy controls or user consent. This latter consequence turned out to be the *fait accompli* that empowered Russia to interfere in U.S. and European democracies.

The first step in scaling the extortion scheme was to audit all the applications using the APIs Zuckerberg had made part of his extortion proposal in the 2012 tests. This audit was conducted in early 2013 and revealed that more than 40,000 companies were using these APIs. Zuckerberg then directed Sam Lessin, Ime Archibong, Doug Purdy, Justin Osofsky and others to make sure lower level employees like Eddie O'Neil, Simon Cross, and Konstantinos Papamiltiadis started scaling the scheme.

Some ground rules were put in place by Zuckerberg and his lieutenants. First, the 40,000 companies were bucketed based on how competitive they were with Facebook and what type of application they were building. Second, a subset of the companies in each bucket were targeted for direct outreach to test the waters around entering into secretive tying arrangements with Facebook under threat of being shut down. Third, the lower level employees were directed to communicate in their direct outreach that if the company expected to continue to access publicly available APIs allegedly offered on non-discriminatory terms, then it had to agree to purchase no less than $250,000 per year in Facebook's mobile ads. We allege this third step was tailored to each specific company, so the $250,000 could be considered a floor and was often combined with additional requests for Facebook to obtain the most valuable user data of the company as well.

With a small army of Facebook employees now churning out Zuckerberg's scheme like McDonald's cheeseburgers, Facebook was able to grow its mobile advertising business faster than any other business in the history of capitalism. All the while, Facebook continued to tell the world about its open, fair and neutral platform where APIs were offered on identical, non-discriminatory terms, just like the platforms managed by Apple and Google. Whenever a company bucked, Facebook would just shut it down under the reciprocity policy and tell the press it cannot comment on specific enforcement decisions. Whenever a company complied, Facebook employees used internal tools to whitelist the company and begin funneling it user data without privacy controls or consent in exchange for the "unrelated" mobile ad payments and the company's own user data. We have described this secretive tying arrangement here and how investigators can prove it entailed repeated privacy violations here.

Federal mail and wire fraud statutes prohibit the use of interstate mail or wire for the purpose of carrying out any scheme involving some kind of fraudulent misrepresentation or omission that would likely deceive people. (18 U.S.C. § 1341 and 18 U.S.C. § 1343). It's safe to say that the hundreds of millions of people who had their data passed to these extorted companies without their consent in exchange for "unrelated" payments were likely deceived, particularly given Facebook's extremely effective concealment campaign—one that probably causes many of you reading this now to wonder if all this is actually true even after Facebook's decade of lies! Although they've lost all credibility, it's still tough to wrap our heads around the depth of their deception.

A thorough investigation into Facebook's practices from 2012 to present will reveal that Facebook willfully caused "the deprivation of

something of value by trick, deceit, chicane or overreaching," that something of value being, among other things, the most intimate and personal information of hundreds of millions of people. Indeed, Facebook engaged in countless instances of wire fraud in which it sold your data through a malicious scheme designed specifically to conceal the fact that it was selling your data.

Act III: The Most Massive Privacy-Violating Scheme in History Concealed Under a Privacy Banner—Ongoing Wire Fraud, Lying to Government Investigators, and the RICO Pattern

The New York Times investigation published on December 18, 2018 demonstrates the ongoing nature of the pay-to-play scheme Zuckerberg first concocted in 2012. The investigation reveals that the actions Facebook took to cover up the scheme in 2014 and 2015, the announcement of Graph API 2.0 and the New Facebook Login, were never about privacy. The more than 50 APIs Facebook "shut down" in this announcement were the same ones Zuckerberg used in his extortion scheme starting in 2012. And the investigation shows clearly that the APIs were not in fact shut down; they were privatized. We have been alleging this in our case for three years now! Oddly enough, the true status of these APIs hasn't actually changed at any point in time. From 2012 to present the status of these APIs has been what one might call: 'secretly privatized'. It's just that, from 2012 to 2015, they were secretly privatized while being publicly available; and, since 2015, they have been secretly privatized while being publicly *unavailable*.

The switch from public availability to public unavailability—which Zuckerberg has repeatedly referred to in testimony as a noble effort to lock down the Platform to prevent bad actors like Cambridge Analytica from abusing our privacy rights—occurs in a single line at the very bottom of this long announcement from April 30, 2014:

> *"In addition to the above, we are removing several rarely used endpoints; visit our changelog for details."*

Please go to the bottom of this post and see it for yourself. This was the one line that covered up all of the conduct you have read so far in this article! We actually decided to sue Facebook in April 2015 precisely because of the phrase "rarely used" in this sentence. It was obviously a lie. These more than 50 APIs represented the very core of the entire platform, and if you were in the software industry at the time, you should have known this too. We watched the news every day waiting for the FTC to file a complaint about this obvious deception. But it seems no one at the FTC had a clue. So, we were left to wage this war on our own.

As we allege in our case, the truth is that Zuckerberg knew even by early 2013 that he would need to find a way to nip this sprawling scheme in the bud once it served its purpose. He also knew that in order to do so publicly, he needed some kind of privacy-related cover for it. So, he directed Mike Vernal to conceal the scheme behind a revamp of the Facebook Login product and announce the two at the same time in order to benefit from a more natural privacy-related

narrative. Mike Vernal was already trying to distance himself from all this, so he put Doug Purdy in charge. Purdy didn't want to be left holding the bag, so he later recruited Ilya Sukhar to be the front man.

In 2013, they settled on a narrative around user trust and control and began shopping it internally in discussions with and presentations to other Facebook employees who had no clue about the scheme. After a lot of tweaking, it was finally ready for prime time in the spring of 2014. It was announced on April 30, 2014, and the public and the United States Government have been buying it ever since. We covered here how Zuckerberg used this narrative in his testimony to Congress last spring. It's the same story Facebook has told government investigators since 2014 about not taking a broad enough view of its responsibility and being too idealistic about connecting the world to anticipate all the ways its platform can be abused. We won't rehash it here. Each time a Facebook executive has told this story to government officials actively investigating Facebook's conduct, that executive has violated 18 U.S.C. § 1001 for knowingly making a false material statement regarding a matter being investigated by a branch of the United States Government. Each offense carries a prison term of up to 5 years.

So, let's talk about RICO. In particular, let's talk about the most difficult aspect of a criminal RICO case, establishing a pattern of racketeering activity, which requires that Facebook executives have committed at least two underlying racketeering acts from an enumerated list. (18 U.S.C. § 1961(1)-(5)). The SEC, DOJ and EDNY have a buffet of predicate acts to choose from. The ones discussed in this article range from violations of laws related to securities, mail and wire fraud, extortion, and making false statements to government investigators. This is not presented as an exhaustive list.

Importantly, these predicate violations must pass the relatedness and continuity tests, meaning the separate racketeering acts must be connected, and they must pose a threat of continued criminal activity. Let's look at relatedness and continuity. What we have here is a clear nexus from 2012 to the present day where one illegal act necessitates the perpetration of another, all beginning with the failed IPO. First, Facebook had to avoid its IPO being cancelled by committing various securities violations. Second, it had to cover up the securities violations by extorting the reliance of thousands of businesses by threatening to bankrupt them unless they provided kickbacks under the guise of legitimate data transfers or mobile ad purchases. Third, it had to cover up this scheme by lying to government investigators for at least the past five years now. These acts all form a logically and actually connected sequence of events in the regular conduct of Facebook's business over a period of at least 7 years. We have spent the past four years of our lives working to demonstrate that this is the true story of the birth and ascendance of Facebook's mobile advertising business in the face of the imminent collapse of its desktop business. Because Facebook is almost exclusively a mobile advertising business today, we believe this is the true story *of Facebook*.

Now let's look at whether there is an ongoing risk of criminal activity. For the sake of argument, assume just for a moment that Six4Three has hit the nail on the head. If all this is in fact true, do you really think there is any possible world in which Facebook just admits to all of it, or even any significant portion of it? Where Facebook stops lying to government investigators? Where it stops intimidating all the potential

witnesses to this scheme? Where it starts producing documents voluntarily to governments that will shed light on this? Where it stops retaliating against Six4Three and using Six4Three as an example of what happens when you try to expose Facebook's fraud? Where Zuckerberg just wakes up one morning and says: "Yep, those Six4Three guys got it right. Kudos fellas!"? In other words, is there anything short of a raid by the FBI on Facebook's offices that would actually get to the bottom of this? The FBI has raided offices for much less….

But even a raid probably won't get to the bottom of it all. Facebook admitted a year ago that it deleted many of Zuckerberg's and other top executives' communications during a critical period in the execution of this scheme. We strongly suspect this spoliation activity has continued. So, yes, we think the continuity requirement is easily met here. Facebook will continue to conceal the truth and lie to investigators and its 2 billion users about its treatment of our private data. And it will continue to use that data as leverage in its secretly privatized APIs. It will do this because it's been the very DNA of the business for at least the past 7 years. And no one has stopped it.

The RICO case against Facebook has been laid out.

What price will we all pay should we fail to pursue it?

Postscript: Anticipating Facebook's Further Retaliation Against Us for Laying Out the RICO Case

Facebook recently got the San Mateo Superior Court to rule that Six4Three has engaged in a criminal conspiracy with its attorneys and has been leaking Facebook's confidential files to the media and government entities for more than a year now.

The Court's ruling last Friday on the crime-fraud exception relies on a document Six4Three sent to many media and government entities that contains exclusively public information, but the Court nonetheless concluded that it leaked Facebook's confidential files. In other words, we believe the Court's ruling actually has no evidentiary support to conclude that Six4Three and its attorneys have engaged in a criminal conspiracy. Further, no evidentiary hearing was held and no formal motion was filed accusing Six4Three or its attorneys of any wrongdoing, so we had no opportunity to properly challenge the Court's decision to invoke the crime-fraud exception. By order of a California court, Facebook is now able to review Six4Three's confidential attorney-client privileged discussions, effectively shutting down our case.

We mention this because we expect Facebook will tell the Court that this article also reveals its confidential files. This is false. All of the information we have shared in this article and in our prior communications with media and government entities is readily available or inferred from files hosted on websites managed by a California court or otherwise on the Internet. Some of the files containing the information described herein include:

· *Discovery Proposal Pursuant to Court's December 13, 2016 Order, filed* ***January 20, 2017****, in San Mateo Superior Court (CIV533328)*

· *Reply to Opposition to Motion to Remand, filed* ***February 9, 2017*** *(3:17-cv-00359-WHA, N.D. Cal.)*

· *Fourth Amended Complaint, filed* ***November 1, 2017****, in San Mateo Superior Court (CIV533328)*

· *Fifth Amended Complaint, filed* ***January 12, 2018****, in San Mateo Superior Court (CIV533328)*

· *Opposition to Individual Defendants' Anti-SLAPP Motion, filed* ***May 17, 2018****, in San Mateo Superior Court (CIV533328)*

· *Proposed Order Denying Individual Defendants' Special Motion to Strike, filed* ***July 9, 2018****, in San Mateo Superior Court (CIV533328)*

· *Styleform Complaint, filed* ***November 2, 2018****, in San Francisco Superior Court (CGC-18–571075)*

As you can see from these filing dates, virtually all of this information has been publicly available for more than a year and in some cases two years now. There are numerous other filings containing information used in this article that are just as old. Don't you think if Facebook really had a legitimate argument sufficient to pierce the attorney-client privilege that it would have raised these issues immediately after the Court posted these documents on its website for the entire world to see? Wouldn't that have been the appropriate time to accuse us of leaking their files in order to pierce the attorney-client privilege? Yet Facebook waited until after the United Kingdom Parliament recommended that the U.S. government pursue a RICO case and after multiple United States enforcement agencies ramped up their criminal investigations. Why?

A potential answer lies in Facebook's responses to the United Kingdom Parliament's publication of seized evidence from our case, which we believe shows that the truth is closing in on Facebook. Every time seized documents from our case are published in the United Kingdom, this is Facebook's response:

> *"A spokesperson for Facebook said the documents were still under seal in a Californian court and it could not respond to them in any detail: 'Like the other documents that were cherrypicked and released in violation of a court order last year, these by design tell one side of a story and omit important context.'"*

This is complete nonsense. It was Facebook's decision to keep the documents from the public. Facebook could notify Six4Three and the Court tomorrow that it wants to provide full context and release the rest of the documents in our case. The Court would accept Facebook's change of position. That is how litigation works. The privilege as to Facebook's documents is held by Facebook, not anyone else, including the Court. The Court can't force Facebook to keep documents sealed if Facebook wants to make them public to provide full context.

Facebook claims our documents are "cherry-picked" and "omit important context" while hiding behind its own decision to keep the documents from the public. This is yet another example of Facebook's deceptive use of language to conceal its commission of illegal and unethical acts.

Nothing is stopping Facebook from providing full context other than the fact that the full context demonstrates the truth of our claims. Our allegations rely on so-called "cherry-picked" documents spanning 8 years

across dozens of employees. At that point, you can't really call them "cherry-picked" anymore, can you? If Facebook is so interested in providing full context, then why has it evaded Parliament's investigation for many months now? Why does Zuckerberg refuse to step foot in the United Kingdom? When the CEO of one of the world's largest companies has to restrict his travel to avoid being subject to the jurisdiction of one of the founding sovereigns of Western Civilization, you know something really fishy must be going on.

Only the SEC, DOJ, and EDNY are in a position to compel Facebook and its executives, former employees and participating companies to tell the truth, the whole truth, and nothing but the truth. Our trial rights to do so have been fought by armies of Facebook attorneys whose retaliatory efforts have put our case on life support. Those retaliatory efforts should also be looked at closely by government regulators here and abroad. They will surely only increase after the publication of this article. We will report back on the actions Facebook asks the Court to take in response to this article, including any further prior restraint or chilling effect on our First Amendment rights.

Thank you for reading. You have no idea what it means to us.

EXHIBIT 3

From:	ComplexCivil
To:	Jennifer Cuellar; ComplexCivil
Cc:	Josh Lerner; Sonal Mehta; Laura Miller; Catherine Kim; SERVICE-SIX4THREE; jrusso@computerlaw.com; csargent@computerlaw.com; Theodore.kramer@protonmail.com; Donald.Sullivan@wilsonelser.com; SBolotin@morrisonmahoney.com; godkin@birnbaumgodkin.com; sgross@grosskleinlaw.com; kruzer@birnbaumgodkin.com; James Murphy; James Lassart; Thomas Mazzucco; Alice Kay; Anne Montastier
Subject:	RE: Six4Three, LLC v. Facebook, Inc.
Date:	Thursday, March 14, 2019 3:50:43 PM
Attachments:	image001.png image002.png image003.png image004.png image005.png image006.png

Ms. Cuellar,

Murphy Pearson is not counsel of record for Six4Three.

Please file and serve a substitution of counsel prior to the hearing tomorrow at 10 am in order to make that appearance.

From: Jennifer Cuellar <JCuellar@MPBF.com>
Sent: Thursday, March 14, 2019 3:47 PM
To: ComplexCivil <complexcivil@sanmateocourt.org>
Cc: jlerner@durietangri.com; SMehta@durietangri.com; LMiller@durietangri.com; ckim@durietangri.com; SERVICE-SIX4THREE@durietangri.com; jrusso@computerlaw.com; csargent@computerlaw.com; Theodore.kramer@protonmail.com; Donald.Sullivan@wilsonelser.com; SBolotin@morrisonmahoney.com; godkin@birnbaumgodkin.com; sgross@grosskleinlaw.com; kruzer@birnbaumgodkin.com; James Murphy <JMurphy@MPBF.com>; James Lassart <JLassart@MPBF.com>; Thomas Mazzucco <TMazzucco@MPBF.com>; Alice Kay <AKay@MPBF.com>; Anne Montastier <AMontastier@MPBF.com>
Subject: Six4Three, LLC v. Facebook, Inc.

Dear Ms. Huerta and counsel,

This is to notify the Court that we intend to contest the tentative ruling on behalf of 643.

Best, Jennifer

MURPHY PEARSON BRADLEY & FEENEY

Jennifer Cuellar
Legal Assistant
88 Kearny Street, 10th Floor
San Francisco, CA 94108
Office: 415.788.1900 x2897
Direct: 415.651.2897
Fax: 415.393.8087
website | vCard | map | email

EXHIBIT 4

[redacted]

From: ComplexCivil <complexcivil@sanmateocourt.org>
Sent: Friday, March 22, 2019 10:57 AM
To: Sullivan, Donald P.; 'Joseph Leveroni'; ComplexCivil
Cc: SERVICE-SIX4THREE; Laura Miller; David Godkin; Bolotin, Steven; kruzer@birnbaumgodkin.com; James Murphy; James Lassart; Thomas Mazzucco; jrusso@computerlaw.com; csargent@computerlaw.com; sgross@grosskleinlaw.com; Rebecca Huerta
Subject: Six4Three v. Facebook (CIV533328) - Six4Three Counsel of Record's Request for Hearing on Ex Parte Applications

The Court has reviewed personal counsel for Birnbaum & Godkin's request to file two ex parte applications and personal counsel for Gross & Klein's joinder:

(1) The Court sets a briefing schedule on the first request: (1) Birnbaum & Godkin and Gross & Klein's ex parte application shall be electronically served on the Court and all other parties by today (3/22) at 11:59:59 p.m. and filed in person by Monday (3/25) at 10:00 a.m.; and (2) any opposition shall be electronically served by Monday (3/25) at 11:59:59 p.m. and filed in person no later than Tuesday (3/26) at 10:00 a.m. There will be no appearances on this ex parte application.

The Court requests the parties address the following: (1) whether personal counsel has standing to address the Court in lieu of their clients who remain counsel of record; (2) whether a party may seek leave to supplement or augment their argument and evidence on motions while under submission; (3) whether counsel of record may disclose the new information *in camera* to the Court without the express consent of the client, who is the holder of that privilege; and (4) whether the Court's prior ruling that the crime-fraud exception waived attorney client privilege applies to the "new information [that] constitutes further concrete evidence of the un-waivable conflict . . . ." requiring an *in camera* hearing.

(2) The second request is premature. Birnbaum & Godkin and Gross & Klein's motions to be relieved as counsel are under submission. As the Court has not ruled on permitting withdrawal, Birnbaum & Godkin and Gross & Klein remain counsel of record for Six4Three.

Lastly, in future emails to the Court, please comply with Case Management Order no. 1, paragraph 7.

From: Sullivan, Donald P. <Donald.Sullivan@wilsonelser.com>
Sent: Thursday, March 21, 2019 2:40 PM
To: 'Joseph Leveroni' <JLeveroni@MPBF.com>; ComplexCivil <complexcivil@sanmateocourt.org>
Cc: SERVICE-SIX4THREE <SERVICE-SIX4THREE@durietangri.com>; Laura Miller <LMiller@durietangri.com>; David Godkin <godkin@birnbaumgodkin.com>; Bolotin, Steven <SBolotin@morrisonmahoney.com>; kruzer@birnbaumgodkin.com; James Murphy <JMurphy@MPBF.com>; James Lassart <JLassart@MPBF.com>; Thomas Mazzucco <TMazzucco@MPBF.com>; jrusso@computerlaw.com; csargent@computerlaw.com; sgross@grosskleinlaw.com; Rebecca Huerta <rhuerta@sanmateocourt.org>
Subject: RE: Request for Hearing on Ex Parte Applications

Ms. Huerta,
Stuart Gross and Gross & Klein join in on this request.

Donald P. Sullivan
Attorney at Law

Wilson Elser Moskowitz Edelman & Dicker LLP
525 Market Street - 17th Floor
San Francisco, CA 94105-2725
415.625.9249 (Direct)
415.385.7221 (Cell)
415.433.0990 (Main)
415.434.1370 (Fax)
donald.sullivan@wilsonelser.com

From: Joseph Leveroni [mailto:JLeveroni@MPBF.com]
Sent: Thursday, March 21, 2019 2:14 PM
To: ComplexCivil <complexcivil@sanmateocourt.org>
Cc: SERVICE-SIX4THREE <SERVICE-SIX4THREE@durietangri.com>; Laura Miller <LMiller@durietangri.com>; Sullivan, Donald P. <Donald.Sullivan@wilsonelser.com>; Joseph Leveroni <JLeveroni@MPBF.com>; David Godkin <godkin@birnbaumgodkin.com>; Bolotin, Steven <SBolotin@morrisonmahoney.com>; kruzer@birnbaumgodkin.com; James Murphy <JMurphy@MPBF.com>; James Lassart <JLassart@MPBF.com>; Thomas Mazzucco <TMazzucco@MPBF.com>; jrusso@computerlaw.com; csargent@computerlaw.com; sgross@grosskleinlaw.com; Rebecca Huerta <rhuerta@sanmateocourt.org>
Subject: Request for Hearing on Ex Parte Applications

Dear Ms. Huerta and counsel,

Counsel for Birnbaum & Godkin, LLP seeks permission to file two *ex parte* applications so that court and counsel may properly address new information made available just yesterday - information that directly impacts the most recent court orders.

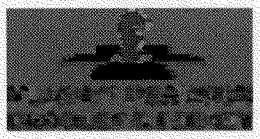
The first *ex parte* application seeks permission to supplement the points and authorities and material on Birnbaum & Godkin, LLP's motion to be relieved as counsel to include new information. The new information cannot be publicly disclosed without waiving privilege, but can be explained to the Court *in camera.* The new information constitutes further concrete evidence of the un-waivable conflict that continues to exist between Birnbaum & Godkin, LLP and its client, and has continued to complicate and obstruct easy compliance with what would otherwise be straightforward court orders regarding discovery.

The second *ex parte* application seeks a modification of the court's order regarding forensic examiners to allow counsel for Birnbaum & Godkin, LLP to meet and confer on the engagement of forensic examiners, as the non-waivable conflict of interest makes it impossible for the firm to undertake such action, or any action, on behalf of its client. For the very same reasons, Birnbaum & Godkin, LLP is also barred from lodging objections to the recent discovery requests on behalf of its client in advance of the April 26, 2019 court date.

If permission is granted, we request a date after Tuesday of next week to submit the applications.

Regards,

Joseph S. Leveroni



Joseph S. Leveroni
Associate

88 Kearny Street, 10th Floor
San Francisco, CA 94108

Office: 415.788.1900 x2879
Direct: 415.651.2879
Fax: 415.393.8087

website | bio | vCard | map | email